(2)

No. 99-2047

Supreme Court, U.S.
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In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

THE STATE OF RHODE ISLAND *ex rel.*
PAUL J. TAVARES, General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Rhode Island

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a regulatory takings claim arising from a State's rejection of an application to fill wetlands be barred due to insufficient investment-backed expectations on the part of the claimant under the following peculiar circumstances: (1) the State had, previous to the claimant's acquisition of the land, rejected an identical application submitted by the claimant's predecessor and (2) the claimant himself had personally handled the earlier rejected application on behalf of the predecessor?

2. Is an inverse condemnation claim ripe where the trial court finds that (1) there was an abject failure to apply for the subdivision which forms the basis which Petitioner now claims was denied and (2) although a land-use agency has authoritatively denied the most physically intensive possible use of certain land, there are reasonably viable, less ambitious, alternative permitted uses which were not yet sought by the owner?

3. Does regulated property have economically viable uses where, when used in a permissible manner, it has a value of 200,000 dollars, a value even greater than the property would have had under the use originally intended by the applicant?

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STATEMENT OF THE CASE

FACTUAL BACKGROUND

Included in the Petitioner's Appendix is the trial decision in the instant case: *Palazzolo v. Coastal Resources Management Council*, C.A. No.: 88-0297, slip op. denying relief after non-jury trial (Wash. Cty. R.I. Super. Ct. Oct. 24, 1997) (Williams, J.) *aff'd*. 746A.2d 707 (R.I. 2000). Having had the benefit of presiding over a nearly two-week trial, Mr. Justice Frank J. Williams of the Rhode Island Superior Court granted judgment to the Defendant-agency, holding that there was no Fifth Amendment taking of the marshlands and associated uplands at issue in this case. The trial judge found that CRMC's denial of a permit to conduct massive wholesale destruction of the entirety of the pristine coastal salt marsh located on the parcel did *not* amount to undue or unbearable interference with legitimate private investment-backed expectations.

To elaborate, Petitioner presented to the trial court a multi-million dollar claim based on a particular grandiose scheme (which scheme had never been adequately detailed before the agency in any event). The scheme presented at trial was a plan to shoe-horn 74 homes, each with its own septic tank system, into a marshland site of roughly 18 acres (of which Petitioner was not even record owner), adjacent to a sensitive coastal pond. The Trial Justice, however, held that the realization of this particular ambitious proposal was not a vested property right which is protected by the Fifth Amendment.

The site at issue in this case is mostly marshland. The area comprises roughly 18 acres of inter-tidal estuarine

coastal pond salt marsh (plus a few additional acres of upland). These 18 acres are located along the southern shoreline of Winnapaug Pond. Salt marshes, such as the site at issue, provide many important public safety and habitat functions.

A Corporation, by the name of Shore Gardens, Inc. ("SGI"), acquired the site in 1959; by that transaction, the site went into the hands of SGI, *not* Mr. Palazzolo individually. Indeed, the area conveyed in 1959, except for some individual lots later deeded out by SGI for development, still stands in the name Shore Gardens, Inc. Thus, Mr. Palazzolo's suggestion that he had acquired the land in late 1959, and to have held it ever since, is completely unfounded. (Petitioner commences the "Factual Background" section of his Petition by creating some confusion in this regard.)

Viewing SGI's parcel as a whole, it is clear that SGI put the land to beneficial use by private lot sales; SGI sold off six separate developable parcels shortly after acquisition. Thus, even if, contrary to the lower court's finding, the relevant acquisition date were to be 1959 (as suggested by Petitioner), these transactions would establish the existence of beneficial use of the land since the time of that acquisition. In other words, even under Mr. Palazzolo's interpretation of the facts, Mr. Palazzolo's holdings were not rendered worthless.

In 1965, the Rhode Island legislature enacted the R.I. Inter-tidal Wetlands Protection Act, declaring that salt marshes were to be protected and, in 1971, the legislature enacted the Coastal Resources Management Act, creating the Coastal Resources Management Council and giving

the CRMC the authority to regulate coastal wetlands. In 1976, CRMC adopted the Coastal Resources Management Plan ("CRMP") which prohibits the filling of coastal wetlands except under rare circumstances. (Under CRMC terminology, this is referred to as a "special exception" but, in this context, this term denotes a much more rigorous standard than under municipal zoning practice.)

On February 27, 1978, the Secretary of State revoked SGI's corporate charter. This fact indicates that the corporation existed at least until that date; therefore, any devolution of title by operation-of-law to Mr. Palazzolo, as belatedly asserted by him, could not have taken place prior to this time. In other words, the Petitioner did not acquire the land (if he ever acquired it at all) until after the statutory prohibitions on filling inter-tidal wetlands, such as the subject parcel, were enacted.

Beginning in the 1960s, Mr. Palazzolo (presumably on behalf of the corporation, although the applications were in his own name) filed a series of overlapping and redundant applications to fill the wetlands on the property. After certain failed applications in the 1960s (finally denied in 1971 and never appealed), Mr. Palazzolo again filed applications with the CRMC to fill the full 18 acres of marshland in 1983 and 1985.

There were three curious facts about his latest set of applications. First, as noted above, they are in Mr. Palazzolo's own name even though the land was then held by SGI. Second , they virtually duplicated the previously rejected applications. Third, the applications called for *filling* of the area, but did not call for *development* of the area as residences. In other words, Mr. Palazzolo hid any

intention to build the project that forms the basis of the instant claim. To put the matter another way, Petitioner disclaimed any intention to apply for the project which Petitioner now complains was thwarted by the CRMC.

The filling of 18 acres of salt marsh proposed by Mr. Palazzolo would not only have completely obliterated that particular section of the ecosystem, but would also have devastated the pond as a whole as well as the finfish and shellfish which depend on that waterbody.

In 1984 and 1986, the Council issued decisions rejecting the 1983 and 1985 applications, respectively. These decisions were affirmed in an APA appeal undertaken by Mr. Palazzolo. In other words, in prior litigation, the Rhode Island Superior Court (per Justice Israel) affirmed the CRMC decisions.

A portion of the site, a piece of upland, would have been approved by the CRMC as a single home site. Moreover, such use would have netted greater proceeds (*i.e.*, $200,000), at less risk, than the subdivision proposal on which Mr. Palazzolo bases the current Petition. This option is still available to Mr. Palazzolo (provided he secures clear title) but he has never pursued it.

PROCEDURAL HISTORY

The travel of this case and the underlying applications are seemingly fraught with complexity: there have been five state-level administrative proceedings and two lawsuits (including two visits to the Rhode Island Supreme Court). However, much confusion can be

avoided by keeping a simple premise in mind: Petitioner has a penchant for repetitive applications.

I. ADMINISTRATIVE PROCEEDINGS.

Mr. Palazzolo filed a series of five applications with state agencies (and one to the United States Army Corps of Engineers). However, these earlier applications do not represent five different concepts or designs. Rather, the applications are mostly duplicative. The five state-level applications (as well as the Federal application) are detailed here.

First, on March 29, 1962, Petitioner filed an application for authorization to dredge 60,000 cubic yards of material from the bottom of Winnapaug Pond and to use the dredge material to fill approximately 18 acres of salt marsh constituting the parcel at issue here. Said parcel stood then, and now, in the name of Shore Gardens, Inc. This application was filed with the State Department of Natural Resources ("DNR"), Division of Harbors and Rivers ("DHR")

On October 5, 1962, the application and plans were returned to the Petitioner because of inaccuracies and the absence of essential basic information.

Second, on May 16, 1963, Petitioner submitted a second application to DHR. This sought to dredge two channels and build a reinforced concrete bulkhead on the parcel. This second application is distinguished from the first application only with respect to the source of the fill material.

Third, on or about April 29, 1966, Petitioner filed a third application. The application proposed to construct a recreational beach facility. Additionally, Petitioner proposed to fill the salt marsh to create the facility.

On November 17, 1971, the Rhode Island Div. of Harbors & Rivers (revoking a prior letter) disapproved both the second application and the third application.

On December 1, 1971, the Army Corps of Engineers, concurring in the result of its State counterpart agency, denied an application the Petitioner had filed with that department. This Petitioner's application to the Corps had been identical to the May 16, 1963 application filed with DHR.

Petitioner took no administrative appeal from these denials nor did he file a takings claim against the R.I. Department of Harbors and Rivers or the Army Corps of Engineers.

At this juncture, it should be noted that the Rhode Island Coastal Resources Management Council ("CRMC" or "the Council") is a successor to the Department of Harbors and Rivers for the purposes of in-water activities and salt marsh filling.

Fourth, on or about March of 1983, Petitioner filed an application with the CRMC to construct a wooden bulkhead on the shoreline of Winnapaug Pond and to fill approximately 18 acres of salt marsh.

Two crucial observations must be made.

The initial observation is that the application filed by Petitioner in 1983 was nearly identical to the May 16, 1963

application filed by Petitioner with the Division of Harbors & Rivers and which was denied by that agency in 1971.

The next observation is that, in this 1983 application to the CRMC, there was no indication (either in the application materials themselves or through the direct testimony given by Petitioner before the CRMC) that he had any intention of pursuing a residential subdivision.

The CRMC regulations, as well as the testimony of the Council's executive director, confirm the fact that Petitioner's application was a piecemeal application. There is a severe distinction between applying to merely fill, on one hand, and applying to fill *and* develop, on the other. If the Petitioner had advised the CRMC that he intended to pursue a subdivision, the Council would have deemed the application deficient because it lacked the prerequisite approvals by local, state, and federal agencies.

Specifically, the application lacked Rhode Island Department of Environmental Management Section 404 Water Quality Certification, ISDS approvals, zoning and building approvals, State Building Code Section 8 approval for flood plane construction, Army Corps of Engineers Section 10 Harbors & Rivers Act and Section 404 Clean Waters Act approvals, and Historic Preservation Commission approval.

This application was rejected by a full Council Decision dated July 12, 1984. Notably, the full Council found, *inter alia*, that the application was to "construct and maintain a pile bulkhead and place fill below MHW."

Fifth, on or about January of 1985, Petitioner filed a second application with the CRMC; this application was to construct a recreational beach facility and to fill the salt marsh in order to do so.

Again, a crucial observation must be made. Specifically, based upon the pertinent comparison, the application filed in 1985 was nearly identical to one of the earlier applications filed by Petitioner; *i.e.*, the April 29, 1966, application filed by Petitioner with the Division of Harbors & Rivers which was also denied in 1971.

This application too was rejected. This was accomplished by a decision which was apparently issued on February 18, 1986. Among other findings, this decision found that "the tidal marsh is subject to tidal inundation daily."

II. JUDICIAL PROCEEDINGS.

There followed two lawsuits.

First, the Petitioner appealed under G.L. 42-35-15, The Rhode Island Administrative Procedures Act, from the 1986 decision in which the CRMC denied the Petitioner's application to fill the wetland adjacent to Winnapaug Pond. The Petitioner's complaint was filed on April 3, 1986.

At one point, Mr. Palazzolo attempted to withdraw his appeal from the decision of the CRMC but then changed his mind, resulting in a decision of the Rhode Island Superior Court upholding the agency. *Palazzolo v. Coastal Res. Mgt. Council*, 1995 WL 941370 (R.I.Super., Jan 05, 1995) (C.A. No. 86-1496) (Israel, J.).

Second, Mr. Palazzolo brought this instant action in Washington County Superior Court, in which Mr. Palazzolo sought to have damages assessed for the supposed inverse condemnation of this land. In this action, filed in June 1988, Mr. Palazzolo sued the CRMC, alleging that its denial of the application (which was then also the subject of the administrative appeal before Justice Israel) constituted part of the deprivation of all beneficial use of his property. Mr. Palazzolo asserted that he was entitled to compensation in the principal amount of 3.15 million dollars based on the inability to realize a 74-lot subdivision in which each lot would support an individual residence. Petitioner was quite emphatic in basing his theory of recovery on the prospect of 74 separate homes-sites.

On January 24, 1994, in the instant case, the Superior Court granted a motion to dismiss under Rhode Island Superior Court Rule of Civil Procedure Rule 41(b) for lack of diligent prosecution and failure to comply with the Rules of Civil Procedure. Mr. Palazzolo then appealed that dismissal to the Rhode Island Supreme Court resulting in a decision remanding the case for trial. *Palazzolo v. Coastal Resources Management Council*, 657 A.2d 1050 (1995).

A trial ensued in 1997, resulting in the decision of the trial judge (ruling on a multiplicity of independent alternative grounds); this, in turn, resulted in a second decision from the Rhode Island Supreme Court (explicitly affirming some of the grounds of the trial court and leaving the others undisturbed) now challenged on this Petition.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The question regarding prior regulations is not well presented by these facts.

The Petioner's first issue (relating to regulations which pre-date acquisitions) is a "fact-bound" question in four senses of the phrase. First, this supposedly *cert*-worthy issue is actually mired in factual disputes unworthy of Supreme Court review. Second, once the facts established below are properly understood, it is clear that the broad issue abstracted by Petitioner is not actually presented. Third, the case is odd and unusual; any ruling would have limited real-world precedential importance. Lastly, the facts suggest an alternative ground of affirmance; this renders the purported issue advisory in this context.

In approaching this subject, it is important to quickly recapitulate certain background. The court will recall the duplicative nature of Mr. Palazzolo's submissions. *See* Appx. A-5 (detailing the "nearly identical" prior applications). The 1960s set of applications (rejected in 1971 under previous regulations) and the 1980s set of applications (rejected in the mid-80s under the current regulations and giving rise to this suit) were identical.

The fact that the underlying applications were really repeat filings of plans rejected in 1971 makes this case unique.

In other words, having seen that his future property had been regulated in a certain manner in 1971, Petitioner necessarily had limited expectations thereafter. He must have expected that the land would be regulated in a

similar, or more restrictive, manner in 1978 when he acquired the land. The same applies to 1983, the date of his redundant application. Thus, Mr. Palazzolo necessarily lacked an individual expectation of massive developability because of his own familiarity with identical prior applications which were denied under the previous regulatory regime.

In this light, the four aspects of the fact-bound nature of the Petition are detailed here.

i. The Petitioner implicitly asks the Court to make factual findings regarding the nature and extent of Petitioner's failed previous attempts to obtain regulatory approval on behalf of a predecessor.

First, because of the special facts cited above, the issue raised cannot be reached without becoming bogged down in complicated questions of fact regarding the precise timing, extent and significance of Mr. Palazzolo's involvement in the previously rejected applications. There are intricate facts to be sorted out. Just one example of such a complexity is the question of the precise extent to which Mr. Palazzolo's prior experience should have forewarned him of the government's actions a decade or so later. Relatedly, the precise comparability of the various regulatory schemes in effect over several decades remains to be determined. In short, the Court would be forced to review not only the events of the 1980s but the events of the 1960s as well.

Thus, the issue as to Mr. Palazzolo's expectations as of 1978 is intensely fact-specific. (Petitioner does not, and cannot, argue against the judgment of the state supreme

court establishing the acquisition date as 1978; decisions as to the rights of sole shareholders with respect to corporate assets during and after the period of corporate existence rest on purely the state-law grounds.) A determination was made by two lower courts that Mr. Palazzolo lacked sufficient expectations at the time of his acquisition. These findings must be reviewed, if they are to be reviewed at all, in light of Mr. Palazzolo's prior familiarity with the State's rejection of previous identical applications made almost thirty-five years ago.

Petitioner, of course, knows better than to directly attack settled findings of fact. Rather, Petitioner glosses over inconvenient truths. Specifically, Petitioner would have this Court turn a blind eye to Mr. Palazzolo's personal knowledge, years before his own acquisition, of the limited developability of the parcel – knowledge gleaned from his own involvement in failed attempts to obtain regulatory approval for an identical project in the 1960s. However, this Court would not itself turn a blind eye to these circumstances or to the undersigned Respondent's factual contentions. Thus, this Court would inevitably become enmeshed in the complications of a voluminous record.

ii. The question purportedly raised is not in fact presented on this record.

Second, Petitioner misleadingly postulates the question. The lead issue in this case is set out in the Petition as:

> Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.

(Emphasis in original)

While the Petitioner posits a neat academic question, the question does not take into account the peculiar situation at hand. In other words, the instant record is inappropriate for resolution of the issue stated by Petitioner. The facts are complex, as we have seen, in that Mr. Palazzolo, presumably acting on behalf of a corporate owner, had previously been rejected with respect to the exact same scheme. This previous rejection was accomplished at a point in time that was both prior to the acquisition of the land *and* prior to the enactment of the regulation at hand. Such rejection had been accomplished years beforehand under an older, more lenient, statutory scheme.

To take into account the peculiarities of the instant case the question would, at a minimum, have to be restated thus:

> Whether a regulatory takings claim for a particular rejected project is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property and the claimant, prior to acquisition, had previously been rejected for the exact same plan on the exact same land under an earlier, more lenient, regulatory scheme.

Thus, the earlier applications, culminating in a 1971 rejection, make this a poor test case of the issue hypothesized in the Petition. Another case might well present this issue, but these facts do not.

iii. The factual circumstances are quirky and unique.

Further, the issue in the present case is unlikely to recur and is too narrow to warrant review by this Court on *certiorari*. The only real question Mr. Palazzolo raises in his Petition turns on the particular facts of this case alone and are of interest only to the parties to it. It can arise only in those few cases which unfold according to the following scenario: a permit is unsuccessfully sought by a person who also handled an unsuccessful application for the exact same project on the exact same land under a more generous regulatory regime a decade or more before the application at issue and prior to the onset of his ownership.

Properly understood, the case does not in any sense broadly concern the expectations test of the Takings Clause. It involves only the application of that test to idiosyncratic facts.

iv. The redundant nature of Petitioner's application suggests an alternative ground for affirmance, rendering the issue posed non-dispositive and advisory.

Assuming *arguendo* that this Court were inclined to overlook these complexities in making its *certiorari* determination, the factual nuance of repeat applications presents yet another problem.

Even if this court were to delve into the abstract proposition solicited by the Petitioner, the Court would make little progress in resolving the case at hand. This is

because the repeat application aspect of this case gives rise to an alternative ground of decision in favor of the Respondent. In sum, the Court's efforts would be advisory.

One reaches this conclusion by exploring the logical implications of the Petitioner's redundant applications. The duplicative nature of Mr. Palazzolo's submissions suggests the legal conclusion that any conceivable taking took place in 1971, not 1983.

Again we start with the acknowledged fact that the 1960s set of applications (rejected in 1971) and the 1980s set of applications (rejected in the mid-80s and giving rise to this suit) were identical.

A necessary conclusion follows. The fact that the underlying applications were really repeat filings of plans rejected in 1971 bars this case. If the CRMC's action constituted a taking, then the DNR's action did too. If so, Petitioner could have brought suit over the 1971 decision. Once having a claim, a Petitioner must act in a timely manner.

After the claim is time-barred, a Petitioner cannot stage a reenactment of the incident in order to revive his claim. This is especially true in the takings context. A particular property interest can be taken only once. Once confiscated, a property interest is not available to be confiscated anew.

In other words, if there were a taking, it was in 1971 and this suit is well outside of any possible limitations period.

2. The claim is not ripe because the Petitioner never applied for the project.

Here again, this case is uniquely fact-bound. Petitioner avoids certain essentials – the forgotten fact is that Petitioner never applied to develop the property in the manner which forms the basis of his claim.

The Petition relies on the finality branch of the ripeness doctrine. Within that branch, the Petition focuses on the definitive decision requirement. But there is another aspect to the ripeness doctrine which the Petitioner ignores: The meaningful application requirement. Any grant of *certiorari* to review the lower court's application of the ripeness test would be a futile gesture in light of the abject failure to meet the meaningful application requirement.

The ripeness requirement has special force in the takings context. The leading case is, of course, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), ruling that a "final, definitive position regarding how [the governmental entity] will apply the regulations at issue to the particular land in question" is required. *Id.* at 191, 105 S.Ct. at 3119. *Williamson County* requires that an applicant must obtain a conclusive determination whether a specific proposed development will be permitted in order to bring a takings claim. *Id.* at 193, 105 S.Ct. at 3120. The *Williamson County* Court also indicated that the "final decision" element requires a "plan for developing [the] property." *Id.* at 187, 105 S.Ct. at 3117. Thus,

Williamson County has given rise to a "meaningful application" threshold. Lower federal courts have, therefore, found claims *un*ripe where a developer, even after making demonstrable efforts, failed to make its development intentions clear. Reflecting this standard, the First Circuit ruled that "[t]o be 'meaningful,' an application . . . must be essentially complete, must realistically describe the desired use, and must be reasonably current." *Gilbert v. City of Cambridge*, 932 F.2d 51, 63 n.15 (1st Cir. 1991), *cert. denied*, 502 U.S. 866, 112 S.Ct. 192, 116 L.Ed.2d 153 (1991).

Courts have said that, even if a property owner does make significant efforts, these efforts must be directed specifically to the intended development of the property. A property owner must be seeking to develop the land, rather than simply asserting a legal position. For example, mere opposition to a down-zoning, coupled with suggestions to continue pre-existing zoning, will not suffice; a property owner must give "indication . . . of how [it] might intend to develop the property if permitted to do so." *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990), *cert. denied*, 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1992); *see also Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926, 941-42 (D. Hawaii 1986) ("Petitioners have been involved in an ongoing attempt to develop . . . a resort. The majority of their activity, however, has been attempts to influence the drafting of the . . . Plan and amendments. . . . Petitioners have made no attempt to apply for development permits, zoning changes or variances . . . under [the] present zoning"); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 n.37, 101 S.Ct. 2352, 2371 n.37, 69 L.Ed.2d 1 (1981) (a taking claim by an association of coal

miners was not ripe because they "made no showing . . . that they own tracts of land that [are] affected by the provision.").

In sum, a meaningful application must be formally filed, must be essentially complete, and most importantly, must reveal the project which ultimately forms the basis of the takings claim.

Turning to the matter at bar, it is incomprehensible that Petitioner can claim that development opportunities were taken from him when such opportunities never formed the basis of an application. It would be a perversion of sensible process for the Petitioner to be allowed, in essence, to initially apply to a Court to vindicate an alleged right to build; this would be incongruous in light of the fact that he never sought such permission from any agency. Indeed, if Petitioner had sought to realize his development rights he would have first applied to the Rhode Island Department of Environmental Management for an ISDS (individual sewage disposal system, *i.e.*, septic tank) permit rather than to the CRMC for a fill permit. It is a further perversion of sensible process for Petitioner to direct his litigative wrath at the wrong agency – the CRMC, which is not in a position to approve or deny the ISDS (septic tank) permits which would be the legal cornerstone of any allowable development. Moreover, if Petitioner had followed the course of action called for by the *Williamson* doctrine, the judiciary would now be left in the dark as to the prospect of wholesale septic failure.

The claim is not ripe on this basis alone, even if it were ripe from a definitive decision standpoint. Therefore, *certiorari* would be a futile gesture at best.

3. The question regarding economically viable uses of regulated property is not presented by these facts.

The denial of a particular application usually does not constitute a taking when there are other economically viable alternatives still permissible. Petitioner cannot escape the effects of this rule by claiming that an application for any particular project would have been futile. It is sufficient if the CRMC would have probably been favorable to other, more modest proposals from this developer. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, at 353, n.9, 106 S.Ct. 2561, at 2568, n.9, 91 L.Ed.2d 285 (1986) ("[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.") *Baytree of Inverrary v. Lauderhill*, 873 F.2d 1407 (11th Cir. 1989) (owner must explore more modest proposals where agency will not let him develop land as originally intended); *Brecciaroli v. Connecticut*, 362 A.2d 948 (Conn. 1975) (denial of application to fill portion of wetland not a taking where owner could make subsequent application to fill smaller area). Specifically, the Council would be happy to have Petitioner situate a single home thus allowing Petitioner to realize $200,000.

4. There are multiple other grounds to sustain the lower court decision.

There are a multiplicity of other grounds for affirmance; these alternative bases of decision suggest that *certiorari* would be an academic exercise.

- Assuming, *arguendo*, that Petitioner's acquisition date is deemed to be the date on which SGI acquired the

site, Petitioner still lacks sufficient expectations with respect to five crucial lots which were not acquired until 1969, after the inter-tidal wetlands Act came into effect.

- It is never a taking to forbid uses which, because they are barred by "background principles of the State's law . . . nuisance," are not originally part of the owner's title rights. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- The public trust doctrine and the corresponding law of riparian rights, establishes that the State owns submerged and intertidal lands (such as the land at issue here). *E.g., Narragansett Co. v. MacKenzie*, 34 R.I. 103, 112, 82 A. 804, 809 (1912) ("fee of the land below high-water mark is in the state").

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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